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IN THE

# Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,

*Petitioners,*

v.

RICHARD HODGES, ,

*Respondent.*

BRITTANI HENRY, ET AL.,

*Petitioners,*

v.

RICHARD HODGES,

*Respondent.*

Consolidated Case Captions Listed on Inside Front Cover

*On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## BRIEF OF AMICI CURIAE WYOMING LEGISLATORS AND SCHOLARS OF FULL FAITH AND CREDIT IN SUPPORT OF RESPONDENTS

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*Petitioners,*

v.

RICHARD SNYDER, ET AL.,

*Respondents.*

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VALERIA TANCO, ET AL.,

*Petitioners,*

v.

WILLIAM EDWARD "BILL" HASLAM, ET AL.,

*Respondents.*

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TIMOTHY LOVE, ET AL. AND GREGORY BOURKE, ET AL.,

*Petitioners,*

v.

STEVE BESHEAR,

*Respondents.*

## QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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## INTEREST OF AMICI CURIAE[1]

Amici Curiae include legislators of the State of Wyoming who support their state law defining marriage as the union of a man and a woman. They are concerned that if this Court agrees with the arguments Petitioners raise, their state's autonomy over the definition of marriage within their borders will be subverted by the varying marriage policies of their sister states. These legislators are Cheri Steinmetz, Curt Meier, Nathan Winters, Scott Clem, Mark Jennings, Gerald Gay, Garry Piiparinen, Tom Reeder, Allen Jaggi, Marti Halverson, Robert McKim, Kendell Kroeker, Roy Edwards, Harlan Edmonds, Bunky Loucks, and Theodore J. (Jim) Blackburn.

Amici Curiae also include scholars who have studied and written on the Full Faith and Credit Clause, conflicts of laws, and marriage recognition. They are concerned that Petitioners' "marriage recognition" arguments mischaracterize the relevant legal principles and risk compromising well-established conflicts-of-law principles. These scholars are listed as follows:

Jeffrey L. Rensberger is a Professor of Law and Vice-President for Strategic Planning and Institutional Research at South Texas College of

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[1] Parties to these cases have consented to the filing of this brief and letters indicating their consent are on file with the Clerk. *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Law. He has written scholarly works on conflict of laws issues raised by same-sex marriages.

Richard S. Myers is a Professor of Law at Ave Maria School of Law. He teaches courses on conflicts of laws and has written multiple scholarly articles on the inter-jurisdictional recognition of same-sex marriages.

Lloyd Cohen is a Professor of Law at George Mason University. He has published writings on numerous legal issues including marriage and divorce.

## SUMMARY OF ARGUMENT

The overarching question before the Court in these four cases is not whether an exclusively male-female marriage policy is the best, but only whether it is allowed by the U.S. Constitution. In other words, the question is not whether government-recognized same-sex marriage is good or bad policy, but only whether it is required by the U.S. Constitution. And the specific question addressed in this brief is whether the Constitution requires a State that defines marriage as a union between a man and a woman to recognize a same-sex marriage validly performed in another State. It does not.

States have never been constitutionally mandated to recognize marriages that conflict with their marriage definition or their public policy. *See* Part I.A., *infra*. The Full Faith and Credit Clause does not compel states to recognize marriages that are contrary to their public policy, so whether or not

to recognize a sister-state marriage is a choice of law matter. *See* Part I.B, *infra*. The constitutional limitations on choice of law, as opposed to enforcement of judgments, are minimal. *See* Part I.C., *infra*. In addition, the constitution should not be interpreted to require each state to enforce its sister-state's policies. *See* Part I.D., *infra*. Furthermore, a refusal to recognize a marriage does not end the marriage; it simply declines to enforce or recognize the marriage in that state. *See* Part I.E., *infra*.

Petitioners and their *amici* mistakenly assert that individual states, much like the federal government, are constitutionally bound to recognize as valid same-sex marriages entered into in other states. Such claims persistently ignore both history and the decisions of this Court, including *United States v. Windsor*,[2] which provide that states retain the traditional right to define marriage, each for themselves. *See* Part II, *infra*.

Finally, a ruling for the states on the first question presented necessarily requires a ruling for the states on the second question presented. For if this Court finds a sufficient rational or compelling basis for defining marriage as the union of a man and a woman, such a basis will suffice for a state's decision not to recognize out-of-state unions that conflict with its marriage definition. *See* Part III, *infra*.

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[2] 133 S.Ct. 2675 (2013).

## ARGUMENT

### I. States are Not Required to Recognize Marriages That Conflict With Their Own Marital Definition or Public Policy.

In *Windsor*, the Court applied a higher—"careful consideration"—level of scrutiny to Section 3 of the federal Defense of Marriage Act ("DOMA") because it was an untraditional intrusion of federal law into the marriage relation. That section, according to the Court, "rejects a long-established precept."[3] It "departs from [the] history and tradition of reliance on state law to define marriage."[4] Because of this, Section 3 of DOMA merited "careful consideration" as a "discrimination of an unusual character."[5] In contrast to that provision, there is nothing novel or "unusual" about state laws that define marriage as the union of a man and a woman.

#### A. States Have Long Asserted and Exercised the Power to Deny Recognition to Marriages Performed in Other Jurisdictions that are Contrary to their Own Public Policy.

The long tradition in American law is that although a marriage is generally to be regarded as valid if valid at the place of celebration, it need not be recognized if it is contrary to the forum's public policy. The "'place of celebration rule' is a state common-law rule rather than a constitutional

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[3] *Windsor*, 133 S.Ct. at 2697.
[4] Id. at 2692.
[5] Id.

mandate."[6] That is, each state has generally decided on its own to adopt this rule, with whatever exceptions it may decide to engraft upon it as a matter of its own choice of law apparatus and wholly apart from any constitutional compulsion.[7] Nothing in the Constitution requires the States to do this.

The First Restatement of Conflict of Laws stated the place of celebrations as a general rule.[8] But the Restatement also excepted from this general rule of recognition marriages contrary to the public policy of the domicile of either party.[9] Moreover, one of the exceptions under the First Restatement is precisely descriptive of cases involving state laws defining marriage as the union of a man and a woman. The First Restatement provided for non-recognition of a "marriage of a domiciliary which a statute at the domicile makes void even though celebrated in

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[6] See Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 933 (2006).

[7] See, e.g., *Christiansen v. Christiansen*, 253 P.2d 153, 156-7 (Wyo. 2011).

[8] See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 121 (1934) ("a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with.").

[9] See id. § 132 (marriage void if "against the law of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with"—for example, in cases of polygamy, incest, miscegenation, or marriages contrary to a statute of the domicile).

another state."[10] This shows how far state non-recognition laws are from being novel or unusual.

The First Restatement also excepted from the place of celebration rule the giving of any effect to a marriage which was "offensive to the policy" of the forum, whether or not a party to the marriage was a domiciliary.[11] This rule of non-recognition of marriages against public policy was a part of a broader principle under which a state generally need not recognize foreign law if it was contrary to public policy.[12] And notably, this Court long ago recognized that a state may decline to apply sister-state law on the grounds of public policy.[13] To do otherwise would allow one State to dictate policy in a sister State—something entirely contrary to our system of federalism in which each State is sovereign.

The Second Restatement carries these rules forward.[14] Like the First Restatement, the Second

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[10] Id. § 132(d).

[11] See id., § 134 ("If any effect of a marriage created by the law of one state is deemed by the courts of another state sufficiently offensive to the policy of the latter state, the latter state will refuse to give that effect to the marriage.").

[12] See id., § 612 ("No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.").

[13] See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932) (a state might deny a right under sister-state law "because the enforcement of the right conferred would be obnoxious to the public policy of the forum").

[14] See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy

Restatement has a broad and general exception to normal choice of law results for any type of law contrary to public policy.[15]

That there are relatively few cases in recent times applying the authority to refuse recognition to a marriage on the ground of public policy is due to the largely homogenous array of state marriage laws. Until same-sex marriage became possible in some states, there were few occasions for a state to decline to recognize another state's marriage as against public policy; most states had all but identical marriage policies.

Notwithstanding this general homogeneity among the states' marriage laws throughout our Nation's history, there have been many examples of states asserting this authority and declining to recognize another state's marriage. For example, the Wisconsin Supreme Court refused to recognize a sister-state marriage that was in violation of the forum's temporary prohibition on remarriage following a divorce.[16] The court there explained that a "state undoubtedly . . . has the power to declare that marriages between its own citizens contrary to its established public policy shall have no validity in its courts, even though they be celebrated in other states, under whose laws they would ordinarily be

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of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.").

[15] See id. § 90 ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.").

[16] *Lanham v. Lanham*, 117 N.W. 787, 788 (Wis. 1908).

valid."[17] Illinois courts have reached the same outcome on similar facts, stating that "courts will not under the guise of comity between states enforce or carry into effect or recognize a foreign contract, which is void under the statutes of this state, where the statute is a declaration of public policy."[18]

The Alabama Supreme Court employed similar reasoning when declining to recognize a marriage between an uncle and niece even though the marriage was valid at the place of celebration.[19] It held that the "Legislature is fully competent to declare what marriages shall be void in its own state, notwithstanding their validity in the state where celebrated, whether contracted between parties who were in good faith domiciled in the state where the ceremony was performed, or between parties who left the state of domicile for the purpose of avoiding its statute, when they come or return to the state."[20] And when faced with the same question, Connecticut and New Jersey courts have likewise declined to recognize out-of-state marriages.[21]

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[17] Id.; see also *In re Est. of Toutant*, 633 N.W.2d 692, 697 (Wis. App. 2001) (similar remarriage prohibition and result).

[18] *Nehring v. Nehring*, 164 Ill. App. 527, 532 (Ill. App. 2d Dist. 1911).

[19] *Osoinach v. Watkins*, 180 So. 577, 581 (Ala. 1938).

[20] Id.

[21] See, e.g., *Catalano v. Catalano*, 170 A.2d 726, 728 (Conn. 1961) (declining to recognize Italian marriage between uncle and niece); *Bucca v. State*, 128 A.2d 506, 510 (N.J. Super. Ch. Div. 1957) (similar facts).

The Virginia Supreme Court has also refused to recognize a foreign marriage that conflicts with its state's public policy.[22] New Hampshire courts too, have declined to recognize out-of-state marriages, explaining that the place of celebration "rule holds only where it does not stand opposed to the religion, morality, or . . . institutions of the [jurisdiction] in which it is sought to be applied."[23] Finally, Kentucky's highest court has declared void an out-of-state marriage between first cousins even though the parties at the time of their marriage were domiciled in the place of celebration and the marriage was valid there.[24]

The foregoing discussion thus demonstrates, and our country's history further attests, that there is nothing novel or unusual about a state declining to recognize a marriage from another jurisdiction when extending that recognition would conflict with the state's own public policy.[25]

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[22] *Toler v. Oakwood Smokeless Coal Corp.*, 4 S.E.2d 364, 368-69 (Va. 1939) (refusing to recognize sister-state marriage because it was "bigamous and contrary to our laws and public policy").

[23] *True v. Ranney*, 21 N.H. 52, 55 (1850) (in refusing to recognize a sister-state marriage because one party lacked mental capacity).

[24] *Ex parte Bowen*, 247 S.W.2d 379, 379 (Ky. 1952).

[25] See also Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations*, 2008 B.Y.U. L. Rev. 1855, 1863 (2008) ("The tension between comity and domestic policy when a foreign-created controversial relationship is introduced into another jurisdiction is [not] novel in the area of family law . . . .").

### B. The Full Faith and Credit Clause Does Not Compel States to Recognize Marriages that are Contrary to Their Public Policy.

The Full Faith and Credit Clause, Article IV, Section 1, of the Constitution states, "Full Faith and Credit shall be given to each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."[26] The Full Faith and Credit Clause enabled the sovereign states to come together to form one union without requiring that everything citizens establish in one state must be forfeited when they move to another state,[27] but the Clause does not require a state to recognize the policies of another state when doing so would undermine that state's own public policy.

In *Baker v. General Motors Corp.*,[28] this Court explained the differing constitutional obligations of states when assessing sister-state law as opposed to a sister-state judgment:

> Our precedent differentiates the credit owed to laws (legislative measures and

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[26] U.S. Const. art. IV, § 1.

[27] See Erin O'Hara O'Connor, *Full Faith and Credit Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION (2D ED.), available at http://www.heritage.org/constitution#!/articles/4/essays/121/full-faith-and-credit-clause.

[28] 522 U.S. 222 (1998).

common law) and to judgments. "In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded." *Milwaukee County*, 296 U.S., at 277, 56 S.Ct., at 234. The Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501, 59 S.Ct. 629, 632 (1939); see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–819, 105 S.Ct. 2965, 2977–2978 (1985). Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force. A court may be guided by the forum State's "public policy" in determining the *law* applicable to a controversy. See *Nevada v. Hall*, 440 U.S. 410, 421–424, 99 S.Ct. 1182, 1188–

> 1190, 59 L.Ed.2d 416 (1979). But our decisions support no roving "public policy exception" to the full faith and credit due *judgments*.[29]

Since laying out this standard in *Baker*, this Court reaffirmed in *Franchise Tax Board of California v. Hyatt*[30] that "full faith and credit 'is less demanding with respect to choice of laws' than it is with respect to judgments."[31] Thus, because a marriage is not a judgment,[32] courts may consult "the forum State's 'public policy.'"[33]

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[29] Id. at 232-33 (emphasis in original).

[30] 538 U.S. 488 (2003).

[31] Richard S. Myers, *The Public Policy Doctrine and Interjurisdictional Recognition of Civil Unions and Domestic Partnerships*, 3 Ave Maria L. Rev. 531, 536 (2005) (quoting *Hyatt*, 538 U.S. at 494). This Court in *Hyatt* confirmed that "the Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Hyatt*, 538 U.S. at 494 (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) and *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939)).

[32] See Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 Creighton L. Rev. 147, 167 (1998) ("To treat a marriage . . . as a 'judgment' would make nonsense out of a great deal of existing full-faith-and-credit doctrine. If a marriage license is a 'judgment,' then every one of the hundreds of decisions that have refused to recognize out-of-state marriages has been an undetected violation of the Clause.") (footnote omitted); Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 Creighton L. Rev. 409, 421-22 (1998) ("A marriage is not a judgment for full faith and credit purposes . . . but (truly) a "ministerial" act. . . . [A]ll

*Windsor* points out that "[m]arriage laws vary in some respects from State to State," such as "the required minimum age" and "the permissible degree of consanguinity."[34] Because a state has good policy reasons for promoting marriage as the union of a man and a woman, it does not have to accept out-of-state marriages that undermine its own policy preferences. A state may apply its own marriage laws in preference to an out-of-state policy that it judges would undermine its own policy, because "as a *sovereign* [it] has a rightful and legitimate concern in the marital status of persons domiciled within its borders.[35]

That a state can defer to its own public policy means that when a state is considering whether to recognize a sister-state marriage, the state is simply deciding whether to apply its own law or the law of another state. It is a choice of law matter. It is not a matter of recognizing a judgment under full faith and credit.

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of the hallmarks of a judicial proceeding are missing. There is neither adversariness nor a neutral decisionmaker with the power to grant or deny relief. Indeed, there is no decisionmaker empowered to decide what law to apply . . . .") (footnotes omitted).

[33] *Baker*, 522 U.S. at 232-33.

[34] *Windsor*, 133 S.Ct. at 2691-92. See also Jeffrey L. Rensberger, *Interstate Pluralism: The Role of Federalism in the Same-Sex Marriage Debate*, 2008 B.Y.U. L. REV. 1703, 1743-1795 (assessing the empirical snapshot of the states to show how states are fundamentally different from one another in culture, conditions, and societal values).

[35] *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (emphasis added).

Notably, there is widespread agreement among legal scholars that the Full Faith and Credit Clause does not require states to recognize out-of-state marriages that conflict with their own domestic relations policy. Indeed, a recognized expert in the conflicts of law field, Professor Patrick Borchers, has long recognized that "the Full Faith and Credit Clause cannot be legitimately involved to remove the [same-sex marriage] debate from the political arena. Like a large number of other issues of contemporary concern, same-sex marriage will have to be decided state by state."[36]

Even supporters of same-sex marriage readily acknowledge that the Full Faith and Credit Clause does not require one state to recognize a same-sex marriage formed in another state. Professor Joanna Grossman, for instance, has stated that "[t]he assumption that recognition of . . . same-sex marriages by other states would be both compelled and automatic . . . represented . . . wishful thinking" on the part of same-sex marriage proponents.[37] Going further, she acknowledged that "[t]he legal predicate" for the claim that the Full Faith and Credit Clause would require one state to recognize another state's same-sex marriage "was at best exaggerated" and "at worst a complete fiction."[38] "Historically speaking," Professor Grossman observed, "*over the long history of variations among*

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[36] Borchers, *supra*, at 185.

[37] Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 Or. L. Rev. 433, 449 (2005) (emphasis added).

[38] Id. at 452.

*and conflicts between state marriage laws, full faith and credit principles have never been understood to compel one state to recognize another's marriages.*"[39]

Yale Law Professor Lea Brilmayer has expressed similar sentiments:

> [M]arriages entered into in one state have never been considered constitutionally entitled to automatic recognition in other states. This is in part because marriages are not like judicial judgments, which are announced only after lengthy formal court proceedings in which both sides are represented by counsel. It is also because of the special importance in American law of family relationships, which . . . makes family law distinctive. Finally, it has always been too easy for people to avoid their home-state law by traveling to another state to take advantage of more lenient marriage laws. For all of these reasons, states have always had greater freedom to re-examine the validity of marriages entered into elsewhere than they have to re-examine the merits of a judicial award in a tort or contract case. The state has a right to take into account its local "public policy."[40]

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[39] Id.

[40] Myers, *supra*, at 540 (quoting Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before the United States Senate Committee on the Judiciary, 108th Cong.

Thus, "most scholars agree, as a matter of constitutional theory and interpretation, that states are not compelled under the Full Faith and Credit Clause to honor a marriage that undermines a strong public policy of the state."[41]

This is especially true where, as here, Congress has spoken pursuant to its express authority under the Clause.[42] Although this Court invalidated Section 3 of DOMA in *Windsor*—which simply forbade the *federal* government from recognizing same-sex marriages performed in a state that permitted them—the Court left intact DOMA Section 2, which specifically frees the *states* from any obligation they might otherwise have under the Clause to recognize same-sex marriage performed out of state.[43] Section 2 of DOMA clearly forecloses any opportunity for Petitioners to rely upon the Full

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63, 68-67 (2004) (prepared statement of R. Lea Brilmayer, Professor, Yale University School of Law)).

[41] Grossman, *supra*, at 454.

[42] See Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 Creighton L. Rev. 255, 391 (1998) (explaining that the historical "evidence is compelling that Congress was intended to have broad power to create statutes like [Section 2 of] DOMA under the Effects Clause").

[43] See 28 U.S.C. § 1738C ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

Faith and Credit Clause in challenging the man-woman marriage laws at issue in these cases.

To be sure, DOMA Section 2 and the Full Faith and Credit Clause do not by themselves dispose of Petitioners' recognition claims under the Fourteenth Amendment. But the mere existence of the Full Faith and Credit Clause—combined with the absence of any language in the Fourteenth Amendment dealing with recognition issues—strongly suggests that the Fourteenth Amendment does not require a state to recognize an out-of-state marriage that conflicts with its own public policy. If the Congress that adopted the Fourteenth Amendment and sent it to the states for ratification had intended to restrain the states in exercising their traditional authority to determine whether to recognize rights afforded under the laws of another state, that Congress would have been expected to include such a provision in the Fourteenth Amendment. The absence of such a provision strongly suggests that recognition claims should be dealt with exclusively under the Full Faith and Credit Clause. And as explained above, that Clause does not require states to recognize same-sex marriages formed other states.

### C. On Matters of Choice of Law, States are Free to Apply Their Own Law Under the Due Process Clause if Minimally Connected to the Parties of the Transaction.

The constitutional limitations on choice of law—as opposed to enforcement of judgments—are

minimal. A state may apply its own law if it has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[44] This is the test under both the Full Faith and Credit Clause and under the Due Process Clause.[45] Of course, in the marriage-recognition cases before this Court, the same-sex couples seeking recognition of their out-of-state unions are domiciliaries of the respondent states. That they are domiciled in those states provides more than significant contact with those states to justify the states' application of their own laws and public policy.

More broadly, sufficient connections will likely exist in the vast run of same-sex marriage recognition cases. The factors that influence and limit forum selection also create an interest in the forum. If, for example, the suit is brought in a state because the party opposing recognition of a same-sex marriage has connections with that state, the state will have an interest in not burdening that party with liability based upon recognition of that marriage. On the other hand, if the suit is brought in the state because the same-sex couple, or one of the spouses, has some residence, property, employment, or other connections with that state making it convenient to sue in that forum, the forum

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[44] See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).

[45] Id.

state will likewise have an interest due to the connections of one of the same-sex spouses.

Indeed, the law of jurisdiction ensures that a state will almost always have a connection to the case. And that same connection will satisfy the due process and full faith and credit test for sufficient contacts creating state interests. In the event of an outlier, say a case in which jurisdiction is not based upon contacts but upon service of process within the state, the completely unconnected forum would be barred from applying its own law under the *Shutts* test.[46]

Thus, interested states are constitutionally permitted to apply their own law to same-sex marriages, and any concern about unconnected states applying their law is already handled by existing limitations.

### D. States Must Be Permitted to Avoid Applying Laws of Other States That Offend Forum Policies.

Should the Court declare that the Constitution requires interstate recognition of same-sex marriages, the traditional autonomy of each state from the laws of their sister-states will be undermined. Our nation is a plural one. States are allowed, within constitutional limits, to make choices as to how their societies will be structured. On many matters, states differ little. Such was the case until recently on the definition of marriage. But

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[46] *Shutts*, 472 U.S. at 818.

occasionally spectacular disagreements arise among the states. Traditionally, the Constitution has not been interpreted to require each state to agree to the other's policy. In fact, such a result is logically absurd, as it would appear to require that "the statute of each state must be enforced in the courts of the other, but cannot be in its own."[47]

Today, in addition to same-sex marriage, states are divided over legalization of marijuana. Must a state that has not legalized marijuana recognize and enforce a contract for the sale of marijuana in another state that has legalized use of that substance? State law also differs on the legality of prostitution. Surely a state can decline to recognize a Nevada contract for prostitution services on the ground of public policy. Are states bound to accept all contracts from other states involving surrogate mothers? Must states enforce gambling contracts even though such contracts are void under their own law? If a state has decided as a matter of consumer protection that arbitration clauses are against public policy, must it nonetheless enforce them if they are enforceable under the law of another state? Must states enforce contracts formed in other states for the sale of body parts or tissue for medical research or treatment?

In short, much uncertainty would be unloosed if the Court refuses to allow states the autonomy to decline to apply sister-state law with which it has a profound disagreement. Unless the Court carves out

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[47] *Alaska Packers Ass'n v. Indus. Acc. Comm'n.*, 294 U.S. 532, 547 (1935).

one rule for same-sex marriage and another for all other legal relationships—a proposition that seems indefensible—it is hard to see where the rush to enforcement of sister-state law will end. This will have the unfortunate effect of impoverishing the diversity of legal and political arrangements throughout our plural nation.

Moreover, if recognition is to be demanded in the context of same-sex marriages, it is hardly clear that the state to do the yielding should be the state of domicile rather than the state of celebration. As a matter of respect for sister-state law, it would seem that the real interloper is the state of celebration if it grants a marriage to two persons domiciled in states that disallow same-sex marriages. As Professor Stan Cox has argued, the place of celebration rule seems perverse when applied to couples who knowingly evade the laws of their home state:

> A more arbitrary and illogical choice of law rule is hard to imagine. Although the place of celebration can hardly be called "fortuitous" (after all, the bride and groom quite deliberately arrange to be there), the place where the marriage is celebrated is merely the place where the marriage is celebrated. It is not necessarily the place where the married couple will live out their married life. Surely the state where the marriage is manifested, in the living out of the married life together, has the only legitimate interest in placing prohibitions upon who can marry whom

> or what must be done before a couple is considered qualified to marry. After all, the point of a prohibition on marriage is not for purposes of the ceremony, but for purposes of living together thereafter as man and wife. Thus, the law of the state of the marital domicile, not the law of the place of celebration, should determine the validity of a marriage.[48]

States have interests in recognizing or not recognizing marriages wholly apart from tangible, material, consequentialist reasons. *Windsor* explicitly recognizes this. One reason New York allowed same-sex marriages was to grant "dignity" to such relations.[49] Now, if a state has a sufficient interest in dignifying a given relationship—if that is a sufficient basis for state action as *Windsor* suggests—then by the same reasoning a state would equally have an interest in choosing to dignify, perhaps uniquely, other relationships. States, that is, have interests in asserting their people's own values through their laws and in avoiding the

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[48] Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1069-70 (1999).

[49] See *Windsor*, 133 S. Ct. at 2692. ("By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond . . . a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages").

imposition of contrary values adopted by other States.[50]

This Court has recognized the same principle in analogous contexts. For example, in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*,[51] the Court invalidated on due process grounds a punitive damage award based in part on out-of-state conduct that was (or might have been) treated differently under the laws of the second state. In reaching that conclusion, the Court quoted with approval an earlier decision, *Huntington v. Attrill*,[52] which held that state "[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States."[53] Requiring a State that does not allow same-sex marriage to recognize such a marriage formed in another state would flatly contravene that bedrock principle—in effect permitting the second state to set marriage policy for the first state.

Similarly, the Court in *State Farm* quoted with approval its earlier decision in *New York Life Insurance Co. v. Head*,[54] which held that "it would be

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[50] Professor Joseph Singer has argued for an "expansive definition[] of state interests . . . . [He rejects] the usual practice of confining state interests to the pragmatic or expedient, like keeping people off the welfare rolls." Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 741 (1990).

[51] 538 U.S. 408, 421 (2003) (Kennedy, J.).

[52] 146 U.S. 657 (1892).

[53] Id. at 669.

[54] 234 U.S. 149 (1914).

impossible to permit the statutes of [one state] to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority."[55] That principle applies here as well: Forcing a state that defines marriage as a union between a man and a woman to recognize a same-sex marriage obtained in another state would allow the second state to extend its own policy beyond the "orbit of [its] lawful authority." Such a rule would thus "throw[] down the constitutional barriers" that ensure that each State remains sovereign within its own "orbit."

These settled principles—and the fact that states have interests in recognizing or refusing to recognize marriages—clearly distinguish *Windsor*. There is no *federal* interest in determining whether persons are married. As the Court explained,

> Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations. In *De Sylva v. Ballentine*, 351 U.S. 570, 76 S.Ct. 974 (1956), for example, the Court held that, "[t]o decide who is the widow or widower of a deceased author, or who are his executors or next of kin," under the Copyright Act "requires a reference to the law of the State which created those legal relationships" because

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[55] Id. at 161.

> "*there is no federal law of domestic relations.*"[56]

But there is of course in each state a "law of domestic relations." In the present context—interstate recognition of same-sex marriages—there is an unavoidable clash of interests between the states. This Court has traditionally asserted only minimal constitutional limitations on states as these conflicts between state policies are sorted out by the sieve of history. Often, the conflicts eventually disappear, as the states in time coalesce around a uniform rule. But where consensus does not emerge, federalism and conflicts of laws principles protect the freedom of each state to choose their own course for their communities.

Finally, beyond same-sex marriage lie other non-traditional marriages. Suppose a state chooses to allow polygamous marriages. If the Court rules that same-sex marriages must be recognized, it is hard to see how polygamous marriages would not also fall under the same rule. And since Petitioners are arguing their cases under due process and equal protection and not under full faith and credit, the next case may be a polygamous marriage from another country. If due process requires states to accept same-sex marriages—that is, if such states lack a legitimate interest for declining to recognize marriages that fall outside their chosen definition—it would follow that due process would be violated if a state refuses to recognize a polygamous marriage,

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[56] *Windsor*, 133 S. Ct. at 2691 (emphasis added).

wherever performed, so long as it was lawful at the place of celebration.

### E. Declining to Recognize Marriage Rights Does Not Destroy the Underlying Marriage.

Denying recognition does not take away marriage rights. It just refuses to recognize them in a particular state. A same-sex couple can still enforce their marriage rights in other states that grant or choose to recognize same-sex marriages. A refusal to recognize a marriage does not end the marriage, it simply rules that it may not be enforced or recognized in a particular state. Indeed, this Court has observed that a "state may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere."[57]

## II. The Marriage Recognition Laws Challenged in These Cases are Unlike the Federal Law that the Court Struck Down in *Windsor* (Section 3 of Federal DOMA).

Petitioners wrongly assert that as a result of *Windsor*, individual states, much like the federal government, are now constitutionally bound to recognize as valid same-sex marriages entered into in other states. (See Bourke App. Br. 52-54). Whether it was right or wrong as to Section 3 of DOMA, *Windsor* strongly supports the authority of a

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[57] *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932).

state to define marriage: Every single time that *Windsor* talks about the infirmities of DOMA Section 3, it mentions that the state had chosen to recognize a union that the federal government was excluding. The majority opinion thus expressly said that it was Congress's deviation from the default of deference to state marriage definitions that drove its opinion.

*Windsor* confirms that there is nothing unusual about the autonomy of the states to define and regulate marriage for themselves. The Court stated in *Windsor* that "[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens."[58] In addition, "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the 'protection of offspring, property interests, and the enforcement of marital responsibilities.'"[59] Furthermore, the Court affirmed that "[t]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce."[60]

Most notably, the *Windsor* Court held that "consistent with this allocation of authority, the Federal Government," through our history, has deferred to state-law policy decisions with respect to

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[58] *Windsor*, 133 S.Ct. at 2691.
[59] Id.
[60] Id.

domestic relations."[61] In *Windsor*, the public policy of New York reflected its own community's perspective by first recognizing the validity of same-sex marriages performed in other jurisdictions and then later licensing same-sex marriages in state. Since the states at issue have not chosen to redefine marriage, they should be left to autonomously retain their interest in defining and regulating the marital relationship to reflect their own communities' considered perspectives.[62]

Furthermore, *Windsor* carefully distinguishes the federal intrusion of DOMA Section 3 from the run-of-the-mill responsibility of the states for the regulation of their own domestic relations. This responsibility is "an important indicator of the substantial societal impact the state's classifications have in the daily lives and customs of its people."[63] The Supreme Court in *Windsor* struck down Section 3 of federal DOMA because it created two contradictory marriage regimes within a state that had redefined marriage.[64] However, the strong thread of *Windsor* still remains that the states have the right, without intrusion of the federal government, to reflect their own public policies in their own laws. United States District Judge Juan Perez-Gimenez recently highlighted this feature of *Windsor*:

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[61] Id.
[62] Id. at 2692-93.
[63] Id. at 2693.
[64] Id. at 2694.

> The *Windsor* opinion did not create a fundamental right to same gender marriage nor did it establish that state opposite-gender marriage regulations are amenable to federal constitutional challenges. If anything, *Windsor* stands for the opposite proposition: it reaffirms the States' authority over marriage, buttressing *Baker*'s conclusion that marriage is simply not a federal question.[65]

This Court too should conclude that *Windsor* supports the authority of states to define marriage for their own communities and to decline to recognize out-of-state unions that conflict with their chosen marriage definition.

## III. A Ruling for the States on the First Question Presented Necessarily Requires a Ruling for the States on the Second Question.

The outcome of these cases rises or falls on the Court's resolution of the first question presented: whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex. If Petitioners prevail on that question, the interstate recognition issue becomes irrelevant

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[65] *Conde-Vidal v. Garcia-Padilla* (D.P.R.) (D.P.R. Oct. 21, 2014) (No. 14-1253), 2014 WL 5361987. See also *Baker v. Nelson*, 409 U.S. 810 (1972). "It takes inexplicable contortions of the mind or perhaps even willful ignorance—this Court does not venture an answer here—to interpret *Windsor*'s endorsement of the state control of marriage as eliminating the state control of marriage." *Conde-Vidal*, 2014 WL 5361987 at *8.

because same-sex marriages will presumably exist in all 50 states. But if Petitioners do not prevail on the first question presented, the Court will necessarily have found a sufficient rational or compelling basis for defining marriage as the union of a man and a woman. And this same basis suffices for a state's decision not to recognize out-of-state unions that conflict with its marriage definition.

Judge Sutton observed this very point during oral arguments in the proceedings below, stating:

> Isn't the first question whether a State can decide for its own purposes, its own citizens, whether to [license] same-sex marriage? And if it decides it's not going to do that, for now, and if the U.S. Constitution . . . permits that choice, . . . it seems really odd to me that [the State] can be told, "Okay, even though you can make that choice for your own citizen, if someone comes from another State, that public-policy choice doesn't bind you." . . . And vice versa, . . . if the State . . . under the Fourteenth Amendment must [license] same-sex marriages within its State, then of course, it follows, [the plaintiffs] win the recognition point.[66]

There is thus no logical basis for this Court's answer to the first question presented to deviate

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[66] Audio of Oral Argument at 29:23-30:13, *Obergefell v. Himes*, No. 14-3057 (6th Cir. Aug. 6, 2014), *available at* http://www.ca6.uscourts.gov/internet/court_audio/aud1.php. This citation is to the audio recording downloaded from the referenced website.

from its answer to the second. Therefore, once the Court affirms that the Constitution does not require the states to redefine marriage, it should correspondingly confirm, for the reasons stated in this brief, that states need not recognize out-of-state unions that conflict with their public policy on marriage. In both licensing and recognition, the states' sovereignty over the definition of marriage remains inviolate.

## CONCLUSION

The staggering implications of Petitioners' recognition claims starkly illustrate their foundational flaws. Their constitutional theory, if credited, would effectively require each state to conform its marriage policy to the varying marriage policies enacted in other states. That, in turn, would terminate states' ability to serve as "laboratories" that independently experiment with domestic-relations (and other social) policy.[67] Rather than fostering the states' freedom to experiment with different approaches to difficult social questions, Petitioners' theory would empower one laboratory to commandeer the others, essentially nationalizing the marriage policy of the most inventive state. Because that cannot be the law, the Court should affirm the Court of Appeals' decision.

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[67] See *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Respectfully submitted,

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